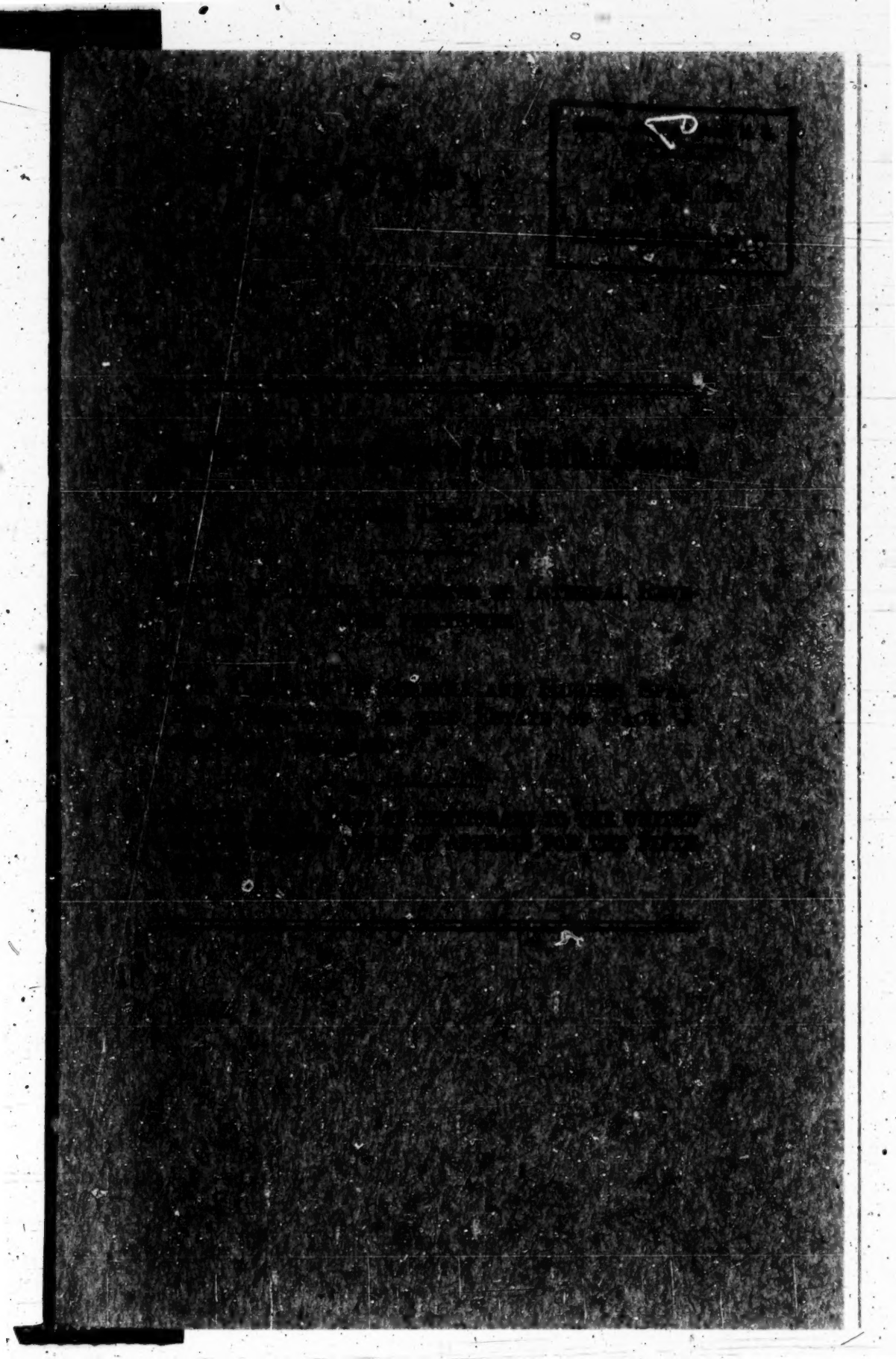

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In the Supreme Court of the United States

OCTOBER TERM, 1945

NO. —

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of Marion H. Allen, Collector of Internal Revenue for the District of Georgia, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered May 3, 1945, affirming the decision of the District Court of the United States for the Middle District of Georgia.

OPINIONS BELOW

The opinion of the District Court (R. 198–213) is reported in 55 F. Supp. 269. The opinion of the Circuit Court of Appeals (R. 225–234) is reported in 149 F. 2d 120.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 3, 1945 (R. 234). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of ~~1925~~ February 13, 1925.

QUESTION PRESENTED

Whether a relinquishment of a power to amend each of two trusts for the sole purpose of preventing the inclusion of their corpora in the decedent's gross estate, in order to avoid the payment of the additional estate tax resulting from such inclusion, was made by the decedent in contemplation of his death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set out in the Appendix, *infra*, pp. 16–19.

STATEMENT

So far as material here, the facts found by the District Court (R. 213–218), and restated by the court below in its opinion (R. 225–229), may be summarized as follows:

The decedent, Jack J. Spalding, a resident of Fulton County, Georgia, died December 8, 1938, at the age of 82. (R. 213.)

In 1925, the decedent, in order to relieve the financial distress of his daughter, Suzanne (Mrs. Schroeder), and of one of his sons, Jack, made a transfer of securities in separate trusts of the value of $50,000 for each. In 1934, he added securities to each trust of the value of $50,000. (R. 226.)

The trusts were of the type usually referred to as "spendthrift" trusts and were irrevocable, except that the decedent, in both the original 1925 trust agreements and in the 1934 additions thereto, reserved a power to amend as follows (R. 227):

> During my life, by the unanimous consent of the said trustee, my said daughter [son] and of myself, the terms of this agreement may be amended, changed, enlarged or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked.

At the time the decedent believed the state of the federal law to be such that the reservation of such power would not require the inclusion in his gross estate at his death of the value of the corpora of the trusts. (R. 136.) But when the decision of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85, holding otherwise, was called to his attention in May, 1937, by another son, Hughes, who was a member of the decedent's law firm, the decedent forthwith relinquished the power. (R. 227.)

The findings of the District Court that the decedent had prepared and executed an instrument renouncing the power reserved in the trusts upon being advised that the gifts remained a part of his estate for estate tax purposes (Finding 10, R. 217), and that his purpose in relinquishing it when he did was "so that they [the trusts] would not be a part of his estate for estate tax purposes" (Finding 12, R. 218), were accepted by the Circuit Court of Appeals as supported by the evidence (R. 229). As the Circuit Court of Appeals stated, the District Court had concluded from such findings that an intent to avoid an estate tax, standing alone, was not conclusive that a gift or a release of a power was made in contemplation of death. (R. 229.)

The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that, in its opinion, the relinquishment of such a power will be held to have been a testamentary disposition only if the decedent "deems death to be near at hand" (R. 233), and that (R. 234):

> * * * in view of the right and privilege of the taxpayer, often declared by the Courts and long recognized by the Congress, to decrease the amount of his taxes or to avoid them altogether by means which the law permits, the mere making of a gift more complete by freeing it from estate taxes that otherwise would accrue upon the donor's death will not be construed as the

equivalent of a testamentary disposition in the absence of proof that the relinquishor considered that death was near at hand.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that a relinquishment of a power to amend, change, enlarge or limit a trust, reserved therein by the decedent, was not made by him in contemplation of his death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended, even though in making it the decedent was motivated solely by a purpose to prevent the inclusion of its corpus in his gross estate at his death in order to avoid the additional estate tax resulting from such inclusion.

(2) In holding that a relinquishment so motivated was not made in contemplation of his death unless the decedent deemed death to be near at hand.

(3) In failing to hold that the respondents had not sustained the burden of proof resting upon them to show that the relinquishment in question was not made in such contemplation.

(4) In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The relinquishment of the power to alter and amend each trust, reserved to the decedent and the beneficiary, brings the transfer squarely

within Section 302 (d) of the Revenue Act of 1926 as amended by Section 401 of the Revenue Act of 1934 (Appendix, *infra*), if the relinquishment of any such power was made in contemplation of death. This is precisely the type of case which the statute was designed to cover. The Circuit Court of Appeals held, however, that a relinquishment of a power to amend a trust made by the decedent solely for the purpose of preventing the inclusion of its corpus in his gross estate at his death for federal estate tax purposes was not made in contemplation of death as a matter of law.[1] This holding is in conflict with the

[1] The court below accepted the District Court's finding that the release was made so that the trusts would not be a part of the decedent's estate for estate tax purposes. (Finding 12, R. 218.) While the court below also accepted the District Court's finding that the decedent was motivated *in making the gifts* by his desire to meet the necessities of his children and set aside property for them free of all claims for taxes or otherwise and that "the release of the power on May 1, 1937 falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934" (Finding 13, R. 218), this is just another way of saying that when the decedent made the transfers for the purposes stated, he wanted them to be free of tax claims and assumed that they were. The dominant motive for the transfers themselves was not a purpose to avoid the tax (R. 156), whereas the relinquishment of the reserved power was induced solely by that motive. (R. 218.) The only purpose to be served by the relinquishment that was not already accomplished by the original transfers was escape from death taxes.

A similar situation prevailed in *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744, where the Second Circuit affirmed a judgment of the district court entered on the verdict of a

prevailing decisions of the Circuit Courts of Appeals for the Second and Third Circuits, grounded on the principle that the decision of this Court in *United States* v. *Wells*, 283 U. S. 102, requires the inclusion in the gross estate of transfers made for the purpose of avoiding the estate tax, since this is a purpose that can be effective only at death. *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582; *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744; *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, 137 F. 2d 653 (C. C. A. 3d), rehearing denied September 20, 1943, affirming *per curiam* a decision of the District Court for the Western District of Pennsylvania, reported in 50 F. Supp. 949, "for the reasons sufficiently and satisfactorily given in the opinion of" the District Court, certiorari denied, 321 U. S. 764. See also *Northern Trust Co.* v.

jury which it had directed in the Government's favor. In that case the decedent had also assumed that the transfer he had made was free from the estate tax, but when advised by an attorney to the contrary he revoked the trust and made a new transfer, on the attorney's advice, which had no life purpose, and would have accomplished nothing not previously effected by the first transfer, except avoidance of the tax. The second transfer was held to have been made in contemplation of death as a matter of law.

Commissioner, 116 F. 2d 96 (C. C. A. 7th), and *Estate of Hofheimer* v. *Commissioner*, decided May 25, 1945, by the Circuit Court of Appeals for the Second Circuit (C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10,206), where it was assumed that a release of a reserved power made to avoid the tax would come within the statute, but the Tax Court's decision was reversed for lack of substantial evidence to support its finding that that was the motive. The applicable Treasury Regulations also so provide. Article 16 of Treasury Regulations 80 (1937 ed.), as amended by T. D. 4966, 1940–1 Cum. Bull. 220.[2] See also I Paul, Federal Estate and Gift Taxation (1942), Section 6.07 (p. 257).

There is now no accepted authority to the contrary, and the decisions of a number of District Courts of the United States are in accord. See

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[2] As so amended, this Article reads, so far as material here, as follows:

"The phrase 'contemplation of death,' as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition."

Anneke v. *Willcuts*, 4 F. Supp. 662 (Minn.); *Mather* v. *MacLaughlin*, 57 F. 2d 223 (E. D. Pa.); *Brown* v. *Routzahn*, 58 F. 2d 329 (N. D. Ohio), reversed on other grounds, 63 F. 2d 914 (C. C. A. 6th), certiorari denied, 290 U. S. 641; *Turner* v. *Hassett*, 37 F. Supp. 996, 998 (Mass.); *Slifka* v. *Johnson* (S. D. N. Y.), decided May 22, 1945 (C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10,205). In this connection it is to be observed that the contrary decision in the case of *Denniston* v. *Commissioner*, 106 F. 2d 925 (C. C. A. 3d), upon the authority of which the decision of the District Court was made to rest but which the Circuit Court of Appeals did not mention, was in effect overruled by the Third Circuit in its *per curiam* affirmance of the District Court's decision in *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra*,

2. In reaching their decision both courts below applied, as controlling, a legal criterion which contained a dual misconception. The court below, following the reasoning of the District Court, held that a transfer in contemplation of death within the meaning of Section 302 (d) must be a transfer "out of the decedent's estate" or else the grantor must "deem death to be near at hand" (R. 233; see also the opinion of the District Court, R. 200).[3]

[3] The District Court said (R. 200):

"* * * The statute is just a rule by which to separate property which in substance is a part of an estate from that which is not. Under that rule, if a gift in form is in reality

The holding that a relinquishment of a reserved power for the purpose of avoiding the estate tax is not a relinquishment in contemplation of death within the meaning of Section 302 (d), for the reason that the relinquishment did not involve a transfer "out of the decedent's estate" and hence was not a substitute for a testamentary disposition, is inconsistent with the holding of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85. In that case this Court held that under similar provisions of Section 302 (d) of the Revenue Act of 1924, c. 234, 43 Stat. 253,[4] a transfer sub-

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a part of an estate, it so remains, notwithstanding the transfer. It is not the transfer which makes the property estate property but it must be estate property in substance before the transfer can be disregarded. The property is classified as estate property or not according to the fact existing at the time of transfer and not by any desire to avoid taxes. The ultimate fact which results in retaining a complete gift in the estate is a special concern about approaching death. A desire to avoid taxes has no legal effect and it has no probative value even as evidence of special concern about death, * * *."

[4] The first sentence of Section 302 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Section 302 (d) (1) of the Revenue Act of 1926 as amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (Appendix, *infra*), are substantially identical with Section 302 (d) of the Revenue Act of 1924, except that the phrase "adequate and full consideration in money or money's worth" is substituted for the phrase "fair consideration in money and money's worth" appearing in the earlier statute. A second sentence was added in Section 302 (d) of the Revenue Act of 1926, dealing with relinquishments made within two years of death, which, with the addition of the phrase "unless shown to the contrary" (designed to eliminate the conclusive character of the presumption), became Section 302 (d) (3) of the Revenue

ject to such a power as is here involved at the time of death came within the statute. The Court further held that the statute was constitutional as applied to transfers made after the date of the enactment of the statute, on the ground that, while the transfer was complete when made, Congress could, for the purpose of preventing evasion of taxes, provide that such a transaction should be deemed testamentary in character. See also *Central Hanover Bank* v. *Kelly*, 319 U. S. 94, 97–98, and *Whitney* v. *Tax Commission*, 309 U. S. 530. It is thus recognized that the transaction is in fact an *inter vivos* transfer, involving no transfer "out of the estate" at death. The provision that a relinquishment of a reserved power in contemplation of death shall bring the transfer within the statute is but a corollary of the provision that the transfer shall be reached if the power is terminated by death. Cf. *Estate of Hofheimer* v. *Commissioner, supra.*

The second branch of the legal criterion adopted by the courts below—that in the absence of a transfer out of the estate the transfer is in con-

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Act of 1926 as amended by Section 401 of the Revenue Act of 1934 (Appendix, *infra*). Section 401 of the Revenue Act of 1934 made no other changes in Section 302 (d) of the Revenue Act of 1926, except those made by the addition of Section 302 (d) (2) (Appendix, *infra*), which have no relevancy here. Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, made amendments to Section 302 (d) (1) of the Revenue Act of 1926, as amended, but under express provisions of Section 805 (b) they do not affect this case and in any event are not material here.

templation of death only where the grantor deems death to be near at hand—is inconsistent with the holding of this Court in *United States* v. *Wells, supra,* and in *McCaughn* v. *Real Estate Co.,* 297 U. S. 606, and *City Bank Farmers Trust Co.* v. *McGowan,* 323 U. S. 594, which make it plain that the statute is satisfied where the motivating factor in the transfer is the concern of the decedent about the devolution of his property at or after death, irrespective of an apprehension of death. The decision below is also in conflict in this regard with the decisions of the Second Circuit in *Farmers' Loan & Trust Co.* v. *Bowers, supra* (68 F. 2d 916); *Farmers' Loan & Trust Co.* v. *Bowers, supra* (98 F. 2d 794), and *First Trust & Deposit Co.* v. *Shaughnessy, supra;* with the decisions of the Third Circuit in *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra,* and *United States* v. *Tonkin,* decided July 3, 1945, not yet reported; with the decision of the Seventh Circuit in *Northern Trust Co.* v. *Commissioner, supra;* with the decisions of the Eighth Circuit in *Updike* v. *Commissioner,* 88 F. 2d 807, and *Pate* v. *Commissioner,* decided June 19, 1945, not yet reported, and with the decision of the Sixth Circuit in *In re Kroger's Estate,* 145 F. 2d 901, certiorari denied April 2, 1945, No. 998, 1944 Term.

4. The decision of the court below disregards established principles as to the burden of proof.

It is our view that since the District Court found that the motive for the relinquishment of the power was the avoidance of the tax, both it and the court below were compelled to hold that the relinquishment of the power was made in contemplation of death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926 as amended.

But even if we are wrong about this, nevertheless the decisions should have been against the respondents, because they have manifestly failed to sustain the burden of proof resting upon them in this suit for refund to show that the relinquishment was not made in contemplation of death.

The Commissioner determined that the decedent made it in contemplation of his death. That determination cast the burden of proof upon the respondents to show otherwise. *Wickwire* v. *Reinecke*, 275 U. S. 101; *City Bank Farmers Trust Co.* v. *McGowan*, *supra*; *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra*. *Cf. Estate of Hofheimer* v. *Commissioner*, *supra*. This means that the respondents were required to show by a preponderance of the evidence that the decedent was actuated by a life purpose in relinquishing the power. This they not only did not do, but to the contrary established that, except for the fact that he desired to prevent the inclusion in his gross estate of the corpora of the trusts and thus to avoid the death tax, he would not have relinquished

the power. Proof of such purpose manifestly does not satisfy the burden of proof. *First Trust & Deposit Co.* v. *Shaughnessy, supra.* Otherwise stated, the governing principle is that, if the respondents fail to show that the motive which induced the transfer (relinquishment) was not a death motive, they failed to sustain the burden. *McCaughn* v. *Real Estate Co., supra.*

In this case, moreover, the relinquishment of the power occurred within two years of death, so that under Section 302 (d) (3) the presumption arises that the relinquishment was made in contemplation of death, and there is no proof here that it was not so made. *Wickwire* v. *Reinecke, supra; Farmers' Loan & Trust Co.* v. *Bowers, supra* (first case); *Farmers' Loan & Trust Co.* v. *Bowers, supra* (second case). Cf. *First Trust & Deposit Co.* v. *Shaughnessy, supra,* and *Estate of Hofheimer* v. *Commissioner, supra.*

5. The questions presented in this case are deemed to be of such importance as to justify review by this Court. Unless reviewed, the decision is likely to have an unsettling effect in an important field of taxation. The case, it is submitted, calls for a reaffirmation by this Court of the governing principle that a transfer, or a relinquishment of a reserved power to amend a trust, is made in contemplation of death where made for the purpose of avoiding the estate tax, and that neither an apprehension that death is near at hand

nor a transfer out of the estate at death is a requisite for inclusion of transferred property in the gross estate under Section 320 (d).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted.

HAROLD JUDSON,
Acting Solicitor General.

AUGUST 1945.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

(2) For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests

which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

(3) The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

* * * * *

Treasury Regulations 80 (1937 ed.):

ART. 21. *Power relinquished in contemplation of death.*—If the decedent had previously held, either alone or in conjunction with another person or persons, a power to alter or amend, or revoke, or terminate a transfer made by him, and the power was subsequently relinquished in contemplation of the decedent's death (the relinquishment not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), then to the extent that the transferred property or any interest therein had been subject to such relinquished power it is to be included in the

gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the power was reserved at the time of the transfer and was relinquished and the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4.01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the power was reserved at the time of the transfer and its relinquishment and the decedent's death subsequently occurred, and the power was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest;

(3) When the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936) and the relinquishment of the power and the decedent's death subsequently occurred, and the power

was either reserved at the time of the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

Within the meaning of this article, it is essential to a relinquishment of a power which is exercisable by the decedent in conjunction with another person or persons that the relinquishment by such other person or persons operates as a complete relinquishment of the power.

If the relinquishment be not admitted or shown to have been in contemplation of decedent's death, but occurred within two years prior to such death, and affected the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value in excess of $5,000 (as of the date of decedent's death, or as of the applicable date under such an election as is referred to in the second paragraph of article 15) then, to the extent of such excess, the relinquishment will be deemed, unless shown to the contrary, to have been in contemplation of decedent's death. (See article 15.)

U. S. GOVERNMENT PRINTING OFFICE: 1948